

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERESA L. BANUELOS

Claimant

VS.

NURSEFINDERS

Respondent

AND

HARTFORD INS. CO. OF THE MIDWEST

Insurance Carrier

Docket No. 1,064,447

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 4, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali Marchant. Chris A. Clements of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to meet her burden of proving the January 3, 2013, accident was the prevailing factor in her current need for treatment. Moreover, the ALJ denied claimant's requests for additional medical treatment, payment of temporary total disability benefits, and payment of medical bills related to claimant's April 14, 2014, surgeries.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 19, 2013, discovery deposition of claimant; the transcript of the May 15, 2014, Preliminary Hearing and the exhibits; and the transcript of the September 4, 2014, Preliminary Hearing, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues the prevailing factor opinions of two court-ordered physicians are not credible in light of the evidence. Claimant maintains she sustained a change in the physical structure of the lumbar and cervical spine, rendering her claim compensable.

Respondent contends the undisputed medical evidence establishes claimant did not sustain an accident as defined by the Kansas Workers Compensation Act, nor did she sustain an injury arising out of her employment. Respondent argues the medical evidence indicates claimant's current condition is an aggravation of a preexisting condition, and the ALJ's Order should be affirmed.

The sole issue for the Board's review is: is claimant's January 3, 2013, accident the prevailing factor in causing her current need for treatment?

FINDINGS OF FACT

Respondent is an agency that provides nurses and CNAs to medical facilities. Claimant started working for respondent as a CNA in 2009. Claimant cares for residents of various facilities. Her duties include feeding, bathing, dressing, and assisting residents with movement. Claimant testified respondent also requires an annual physical for its employees.

Prior to claimant's employment by respondent, she worked at Southwest Medical Center in Liberal, Kansas. In February 2007 claimant sustained a work-related compensable injury to her low back while attempting to help a patient into a bed. This injury resulted in L4-S1 interbody and posterolateral instrumented fusion, performed by Dr. Matthew Henry. Claimant settled her workers compensation claim for this accident on October 21, 2008. Claimant stated she recovered from surgery and had no problems until January 2013.

On January 3, 2013, claimant was working for respondent at Spring View Manor. Early that morning, claimant felt pain in her low back while assisting a resident into an upright position. Claimant explained:

I put my left hand behind his back and then with my right hand try to get his legs to turn him over to sit on the side of the bed. . . . He's very heavy and he don't do much hisself [*sic*]. Well, so then at that time when I was turning him, I felt like a stretch and a burn in my lower back.¹

Claimant stated she continued to work with the pain. She "thought it was just something that was going to come and go."² Claimant testified her pain worsened until she was unable to work. On January 7, 2013, she went on her own to the immediate care department at Via Christi Clinic for treatment. Claimant was given medication and taken off work for a short time. Claimant attempted to work on January 12, 2013, but was unable due to her back pain. She reported her injury to respondent on January 14, 2013.

¹ Claimant's Depo. at 20.

² *Id.* at 22.

Respondent sent claimant back to Via Christi for treatment, where she was provided medication and work restrictions. Claimant underwent physical therapy for thoracic and lumbar pain, but she testified therapy was “not really” helpful.³ She was eventually referred to physiatrist Dr. Jeanette Salone, who recommended work conditioning followed by work hardening. Dr. Salone did not prescribe medication. Claimant testified she developed pain in her neck and left knee during work hardening. Dr. Salone released claimant on June 17, 2013.

Prior to claimant’s release by Dr. Salone, she met with Dr. David Hufford at her counsel’s request. Dr. Hufford, an occupational and sports medicine physician, examined claimant on May 7, 2013. Claimant complained of neck pain, left knee pain, and low back pain with radiation into the right thigh, primarily worse in the evening. Dr. Hufford performed a physical examination and diagnosed “work-related low back strain with previous lumbar fusion and diffuse and evolving symptomatology.”⁴ Dr. Hufford recommended temporary restrictions of light duty. Dr. Hufford further opined:

It is my opinion that a precise analysis for causation and prevailing factor can not be made based on the information available at this point. To provide such an opinion would require further investigation which may include but is not limited to plain cervical spine and left knee x-rays, and MRI of the lumbar spine and possibly an MRI of the left knee. Regarding the cervical spine, should significant degenerative changes be uncovered, then her current symptoms must be considered aggravations of the underlying degenerative disc disease. Likewise, if no significant acute pathology is uncovered in the lumbar spine than [sic] her current ongoing pain must be considered an aggravation of a pre-existing condition since the myofascial component of her symptomatology has been treated and any radicular component to her symptoms would not be present without the previous work injury and subsequent lumbar fusion as a pre-existing condition.⁵

Dr. James Weimar, a court-appointed neutral physician, first evaluated claimant on September 23, 2013. Dr. Weimar reviewed claimant’s history and medical records, including a previous x-ray of claimant’s lumbosacral spine. Dr. Weimar determined claimant had a “mild retrolisthesis of L3 on L4 suggestive of some adjacent level disease at the L3-L4 level.”⁶ Dr. Weimar requested an MRI of the lumbosacral spine and some flexion-extension views of the lumbosacral spine before making a complete diagnosis. Claimant returned to Dr. Weimar on November 25, 2013, with the requested MRI, which revealed apparent adjacent level disease and stenosis at L3-4. Dr. Weimar recommended

³ *Id.* at 28.

⁴ P.H. Trans., Cl. Ex. 2 at 4.

⁵ *Id.* at 5.

⁶ P.H. Trans., Cl. Ex. 3 at 9.

conservative therapy for claimant's lumbar spine, including epidural injections, and requested an additional MRI of claimant's cervical and thoracic spine.

In a subsequent report dated December 18, 2013, Dr. Weimar wrote:

With a reasonable degree of certainty, the L3-L4 adjacent level disease would not be related to her work injury of January 3, 2013. The adjacent level disease is directly related to her previous lumbosacral fusion that was performed in 2007. Although [claimant] may have been asymptomatic until January 3, 2013, this would still be considered an exacerbation and/or aggravation of a pre-existing condition.⁷

On March 12, 2014, claimant returned to Dr. Weimar with the requested cervical and thoracic spine MRIs. Dr. Weimar noted claimant has multilevel degenerative disc disease and spondylosis in the cervical spine, and multilevel degenerative disease with no significant disc herniation in the thoracic spine, based on the MRIs. He did not feel the conditions of claimant's thoracic and cervical spine warranted surgical intervention. Dr. Weimar wrote:

My impression at this point is that her major issue is adjacent level disease secondary to her prior surgery I think that her work-related injury may have aggravated a pre-existing issue, but is not necessarily the prevailing factor in this case. I am recommending that she follow up with Dr. Henry for the adjacent level disease and for any future treatment regarding that. As far as complaints of pain in her neck, shoulder blades and arm I think she should manage that conservatively for now. Most of the findings that I appreciate are all degenerative and chronic in nature.⁸

Claimant returned to Dr. Henry in March 2014 for treatment based on Dr. Weimar's recommendations. Following some conservative treatment, Dr. Henry performed an anterior discectomy with interbody fusions at C4-5 and C5-6 with anterior plate fixation and a decompressive laminectomy at L3-4 with posterolateral instrumented fusion on April 14, 2014.

Dr. Paul Stein, a court-ordered independent medical evaluator, examined claimant on June 12, 2014. Claimant told Dr. Stein she had some improvement since the April 14, 2014 surgery, but complained of some pain in the low back into the right lower extremity which sometimes goes into the left. Her back pain was greater than her leg pain, and she stated she could stand in one location for approximately 15 minutes. Claimant also told Dr. Stein that her neck pain and left upper extremity radiation was improving after surgery but had recently begun to worsen.

⁷ *Id.* at 3.

⁸ *Id.* at 1.

After reviewing claimant's medical records, history, and performing a physical examination, Dr. Stein concluded:

[Claimant] had a prior fusion from L4 to the sacrum. It is well known in the spinal literature that such fusions result in additional stress at the level above due to the lack of motion at the fused segments. Such additional stress often leads to early degenerative change at the level above resulting in "adjacent level disease" which can require treatment, including surgery. Although the work incident was an aggravating and precipitating factor, the primary and prevailing factor in the symptomatology and need for treatment was the preexisting degenerative change and stenosis.⁹

Dr. Stein further noted:

[Claimant] reports the onset of chest, neck, and left upper extremity symptomatology which she relates to physical therapy and work hardening. The pathology in the cervical spine for which surgery was performed is chronic degenerative change. There is no acute disk herniation which might have represented an alteration in the structure of the cervical spine from the activity. In fact, such degenerative changes often becomes [*sic*] symptomatic absent any particular trauma or activity. To the extent that there is a true causal relationship between the therapy activity and the symptomatology, that relationship is one of aggravation of the preexisting degenerative disease and precipitation of symptoms. Therefore, the therapy is not the primary and prevailing factor in the symptomatology and resulting surgery.¹⁰

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

⁹ Stein IME (June 12, 2014) at 7.

¹⁰ *Id.* at 7-8.

K.S.A. 2012 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f) states, in part:

(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹²

ANALYSIS

The ALJ concluded claimant failed to meet her burden of proving her January 3, 2013, accident was the prevailing factor causing her need for treatment, specifically referring to the surgery performed by Dr. Henry on April 14, 2014. The undersigned agrees.

There is insufficient evidence in the record that suggests claimant's January 3, 2013, accident was the prevailing factor causing claimant's low back and neck condition or the need for surgery performed by Dr. Henry. The evidence suggests only that claimant suffered an aggravation of her preexisting lumbar and cervical degenerative disease.

¹¹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹² K.S.A. 2013 Supp. 44-555c(j).

Claimant's own evaluating physician, Dr. Hufford, could not make a precise analysis to determine the prevailing factor causing claimant's condition. No causation opinion from Dr. Henry, the treating surgeon, is contained in the record. While clinical notes from Dr. Henry, dated March 12 and 18, 2014, and a letter from Dr. Henry to Dr. Steven Garner dated March 18, 2014, were placed into the record, none of the entries contain a causation opinion.

In his December 18, 2013 letter, Dr. Weimar told the ALJ the adjacent level disease is not related to the work injury of January 3, 2013. On March 12, 2014, after reviewing new MRIs of the cervical, thoracic and lumbar spine, Dr. Weimar opined the work accident may have aggravated a preexisting issue, but was not the prevailing factor. Dr. Weimar thought most of his findings were degenerative and chronic in nature.

Dr. Stein wrote that claimant's L3-4 problem was aggravated by the work injury, but the primary and prevailing factor leading to the L3-4 decompressive laminectomy performed by Dr. Henry was the preexisting degenerative changes and stenosis. Dr. Stein explained that claimant's prior L4 to sacrum fusion in 2007 created additional stress to the level above, which leads to early degenerative changes, called adjacent level disease. Dr. Stein also did not think claimant's January 2, 2013, accident was the prevailing factor for her cervical condition and surgery.

CONCLUSION

Claimant failed to meet the burden of proving the January 2, 2013, accident is the prevailing factor of her need for medical treatment and resulting surgery.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Ali Marchant dated September 4, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2014.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Ali Marchant, Administrative Law Judge